R. c. Al Saidi, 2006, Cour provinciale du Nouveau-Brunswick, n^{o} 22 (CanLII)

Douze mois et demi de détention avant le procès, huit mois d'emprisonnement pour possession et mise en circulation de faux billets américains de 100 $, et peine consécutive d'un mois pour non-respect d'un engagement. Ordonnance de dédommagement rendue conformément à l'article 738 du *Code criminel*.

Le 11 février 2006, l'accusé et trois autres personnes, à savoir, Mustafa Abdi, Albert Abu et Ahmad Nabout, qui exerçaient leurs activités conjointement, ont écoulé de faux billets américains de 100 $ dans des entreprises locales de la région de Miramichi. Leur mode opératoire était le suivant : ils présentaient un billet américain de 100 $ pour l'achat d'articles de faible valeur et recevaient en retour de la monnaie canadienne.

Au total, ils ont écoulé 2 100,00 $ en billets contrefaits entre 18 h 10 et 19 h 30. Au moment de l'interception, vers 19 h 40, un paquet de 51 faux billets américains de 100 $ a été découvert dans la voiture occupée par les contrevenants. L'accusé avait alors en sa possession 1 957,68 $ en argent canadien. Un deuxième paquet de 50 faux billets américains de 100 $ a été trouvé plus tard dans un sac brun Gucci à l'intérieur d'un chalet où logeaient deux des malfaiteurs. La valeur globale des faux billets américains que les malfaiteurs avaient en leur possession ou ont écoulés s'élevait à 12 200 $.

L'avocat d'Al Saidi a soutenu que l'accusé n'était pas au courant des deux paquets de billets américains contrefaits de 100 $. Le juge a déterminé qu'étant donné que les faits étaient contestés par l'avocat de la défense, la Couronne devait prouver ce facteur aggravant hors de tout doute raisonnable, conformément à l'alinéa 724(3)*e*) du *Code criminel*. Le juge a précisé que la quantité de faux billets en la possession des malfaiteurs ou écoulés par eux constituait le facteur le plus important parce qu'il contribue à déterminer si l'infraction est une opération criminelle commerciale ou bien un ou de simples actes isolés. Le juge a déclaré que le poids de la preuve l'avait convaincu que la possession de droit conjointe de tous les billets par les quatre accusés était la seule inférence raisonnable pouvant être tirée des circonstances.

Le juge a indiqué qu'il ne n'agissait pas là d'un crime impulsif. Compte tenu du nombre de billets que les accusés avaient en leur possession, le juge a conclu que ceux-ci avaient joué un rôle crucial dans cette opération criminelle sophistiquée.

Le juge a fait observer que la contrefaçon est l'une des infractions qui croît le plus rapidement au pays et qu'en raison de cette situation, la Banque du Canada doit moderniser les billets, ce qui entraîne des coûts de production additionnels.

Le juge a insisté sur les principes de dénonciation et de dissuasion pour envoyer un message clair aux personnes qui pourraient être enclines à pénétrer dans ce milieu lucratif.

IN THE PROVINCIAL COURT OF NEW BRUNSWICK

JUDICIAL DISTRICT OF MIRAMICHI

Citation: 2006 NBPC 22

Date: August, 21, 2006 **Docket:13441313, 13441513**

Between:

Her Majesty, The Queen

- and -

Mohammad Hasan Al Saidi

Before:	**Judge Fred Ferguson**
Date of hearing:	**August 15 and 18, 2006**
Date of decision:	**August 21, 2006**

Appearances:

Jean Guy Savoie	**- for the Crown**
Aloysius Hayes	**- for the Defence**

FERGUSON, Prov. Ct. J.

[1] The defendant, Mohammed Hasan Al Saidi was convicted on August 4, 2006 that he:

> **"on or about the 11th day of February A.D. 2006 at or near the City of Miramichi in the County of Northumberland and Province of New Brunswick, did have in their [his] possession counterfeit money to wit: counterfeit one hundred dollar American bills, contrary to Section 450 (b) of the Criminal Code of Canada and amendments thereto.**
>
> **AND ALSO:**
>
> **on or about the 11TH day of February A.D. 2006 at or near the City of Miramichi in the County of Northumberland and Province of New Brunswick, without lawful excuse did utter counterfeit money to wit: counterfeit one hundred dollar American bills as if they were genuine, contrary to Section 452 (a) of the Criminal Code of Canada and amendments thereto.**

In a separate information the defendant was convicted on the same date that he:

> **"on or about the 11th day of February A.D. 2006 at or near the City of Miramichi in the County of Northumberland and Province of New Brunswick, did being at large on his undertaking given to a peace officer or an officer in charge and being bound to comply with conditions of that undertaking fail without lawful excuse to comply with conditions to wit: keep the peace and be of good behaviour, contrary to Section 145 (5.1)(a) of the Criminal Code of Canada and amendments thereto."**

[2] Originally, the defendant was jointly charged with three co-defendants with the first two charges upon which he has been convicted together with a count of possession of forged cheques contrary to Section 354(1)a) of the *Criminal Code of Canada*. By judgment in this matter he was acquitted of that last alleged offence. In earlier proceedings the co-defendants were convicted of some or all of the originally charged offences.

Introduction

[3] The verdict in this particular matter is reported as ***R. v. Al Saidi*** 2006 NBPC 20 (P. Ct.)

[4] The evidence establishes that on the evening of 11th day of February, 2006 the defendant and three others namely, Mustafa Abdi, Albert Abu and Ahmad Nabout were operating together passing counterfeit $100 American currency in the Miramichi area at local businesses. Although neither the evidence led at the trial nor the admissions of fact connect Mr. Abdi to the actual passing of counterfeit bills, memoranda of convictions in relation to him were filed at the sentence hearing. That material, as was the case with the conviction and sentence memoranda filed in

relation to the other co-accused, is an important consideration in arriving at an appropriate sentence for the defendant.

[5] The time frame for the commission of these offences is very compressed. All of the transactions occurred between the hours of 6:10 p.m. and 7:30 p.m. on February 11, 2006. The businesses that were victimized were all located in the former village of Douglastown that is now part of the city of Miramichi. Indeed, the businesses are all within approximately one kilometer of each other. All of the transactions involved counterfeit $100 American bills. In total $2100 in counterfeit currency was successfully passed by the men in that short time frame.

[6] The *modus operandi* was relatively simple. In each of the transactions the perpetrator would offer an American $100 bill for the purchase of some small item or items of little value that would result in Canadian currency being returned to complete the transaction. When the trunk of the Chrysler Sebring (the Sebring) used by them was searched by police it contained many of the items that were described by the cashiers at the various stores as having been sold in return for the bogus bills. In the last few transactions

only minutes elapsed between the passing of the counterfeit bills and the apprehension of the defendants.

[7] At approximately 7:40 p.m. on the date of the offences police were alerted to a spree of suspected counterfeiting that was occurring in that area of the City, and intercepted the Sebring that was occupied by the four defendants within one kilometer of the businesses where the transactions had taken place. At the time of the interception a search of the vehicle resulted in the seizure of 51 counterfeit $100 American bills. These were found stuffed in the area between the seat and the backrest of the left rear passenger seat compartment in the area where Mr. Adu had been seated. Mr. Al Saidi was seated in the front passenger side seat, Mr. Nabout occupied the driver's seat, while Mr. Abdi was in the right rear passenger seat. At the time of detention each man had varying amounts of valid Canadian currency in his possession. The defendant was carrying the most on his person, some $1957.68 in Canadian funds.

[8] The crimes would not likely have been detected had it not been for the strength of character Debbie Carroll, the Human Resources Operations Supervisor at Zellers that

evening. She became suspicious of counterfeit money having been passed at her store and immediately followed one of the defendants, a man completely unknown to her, through the darkened parking lot at Northumberland Square to the Sebring where the other defendants were waiting. By doing so she able to obtain enough vehicle description evidence to identify the vehicle to police for what turned out to be an almost immediate interception. Her commitment to her employer and incidentally to the merchandising community in Miramichi together with her dogged determination not to allow the perpetrators of these crimes to escape prevented others, perhaps many others, from being put at economic risk had these men continued to pass the rest of the $100 counterfeit bills they had in their collective possession.

[9] As the investigation unfolded police retraced the defendants' steps and were led to the Schooner Point Cottages outside the City. There they obtained evidence that the four men had rented two cottages. Mr. Abdi and Mr. Adu, who the defence contends are a same sex couple, occupied one unit. The defendant and his wife as well as Mr. Nabout and his girlfriend occupied the other unit. Among items seized from the two units were fifty more

counterfeit $100 American bills found in a brown Gucci bag in the cabin occupied by Mr. Adu and Mr. Abdi.

The Evidence of the Defendant

[10] During the sentence hearing the issue of the defendant's awareness of the two bundles of counterfeit $100 American bills surfaced. The parties were informed by the Court that evidence of the defendant's direct involvement in the passing of counterfeit bills together with the rest of the accepted evidence at trial established a *prima facie* case of constructive possession of all of the money based on a number of binding and persuasive precedents. ***R. v. Terrence*** [1983] 1 S.C.R. 357; ***R. v. Savory*** (1996), 94 O.A.C. 318 (O.C.A.); ***R. v. Chambers*** (1985), 20 C.C.C. (3d) 440 (O.C.A.); ***R. v. Pham*** (2006), 36 C.R. (6th) 200 (O.C.A.)

[11] Mr. Hayes, during oral submissions, stated the defendant's position that he was not aware of the two bundles of counterfeit bills. Argument ensued on who carried the burden of establishing that disputed fact. Section 724(3)(b) of the *Code* was invoked and a ruling made that inasmuch as the Court had found a *prima facie* case of possession had been made out the defence would carry the

burden of proving the disputed fact to the standard of a balance of probabilities as required by Section 724(3)(d) of the *Code.* In addition, the parties were informed that if evidence was to be called the credibility assessment tool would not be that set out in ***R. v. W. (D.)*** [1991] 1 S.C.R. 742 (S.C.C.) @ 758 but instead that set out in ***R. v. Kicovic*** [2004] A.J. No. 1429 (A.P.Ct.) and ***R. v. C.S.*** [2006] N.B.J. No. 176 (P.Ct.) at paragraph 5. The defendant was called as a witness.

[12] At the conclusion of the defendant's testimony Mr. Hayes renewed his argument that the nature of the disputed evidence was such that it constituted an aggravating circumstance if proved and thus the hearing was properly one conducted under s. 724(3)(e) of the *Code*. The effect of such a determination would be that the burden to prove the aggravating circumstance would be proof beyond reasonable doubt by the Crown in which case ***W.(D.)*** would be the proper credibility assessment tool. The defence took the position that the defendant would have been called as a witness in either event to 1) attempt to meet the burden on a balance of probabilities as required by s. 724(3)(b) or 2) to seek to raise a reasonable doubt in the face of the *prima facie* evidence of constructive possession if s. 724(3)(e) of the

Code was the proper characterization of that part of the sentence hearing. Having carefully considered the matter it is my view that the proper characterization of this part of the sentence hearing is that the nature of the contested issue is one arising from an application of s. 724(3)(e) of the *Code* as an aggravating circumstance.

[13] However muted they are by the relatively sudden increase in the incidence of this sort of criminal activity, the precedents are clear and unambiguous that the quantum of counterfeit bills possessed or passed is the single most important factor in sentence. That is so because it affords the best evidence whether the offence is a commercial criminal enterprise or merely an isolated act or acts. A final determination that the defendant knew and constructively possessed all of the bills would change the character of the offence from one of possessing and passing a few hundred dollars in bills to one that involved him in passing a number of counterfeit bills and possession of $10,100 more of the same nature. If proved beyond reasonable doubt, possession of such a large quantity of counterfeit bills would be a significant aggravating circumstance. See, in this regard ***R. v. Rafuse*** (*supra*).

Given that finding, the proper credibility assessment tool for the defendant's evidence is ***W.(D.)*** (*supra*).

[14] The defendant testified for the first time in the trial during the sentence hearing. He began by explaining that he and his new bride left for their honeymoon in New Brunswick in the company of Mr. Nabout on the 8th of February in the defendant's vehicle after being married in Mississauga. By the time they reached Montreal a problem with the anti-lock brakes had arisen that resulted in them deciding to leave the car at Dorval's Trudeau International Airport. The defendant testified: "I thank God if the car is still there." The three of them spent the night of February 8th sleeping in the car before Mr. Nabout rented a vehicle at the airport very early on the morning of February 9th.

[15] They continued on to New Brunswick stopping in Edmundston and Woodstock before arriving in Fredericton that evening. Mr. Nabout paid for the room. The defendant agreed that Nabout did so by fraud although he claims not to have been aware he had done so at the time. Nabout then left moments after registering to spend the evening with his New Brunswick girlfriend Melissa O'Donnell leaving Mr. and Mrs. Al Saidi in the hotel room.

[16] The next day the three reconnected and travelled to Doaktown to pick up Ms. O'Donnell before heading on to Miramichi to continue the honeymoon. Why the Al Saidi's decided to take Nabout and then his girlfriend with them on the honeymoon was not explained. Their decision is really nothing more than a curiosity.

[17] On arrival at Miramichi the defendant and the rest of the party checked in at a cabin at the Schooner Point Log Cabins several miles out of Miramichi. Food and drink were obtained and paid for by the defendant and a party was held that lasted until about 2:00 a.m. on February 11th. The defendant then went to bed and claims not to have arisen until 4:30 p.m. that day. By that time Mr. Nabout and O'Donnell had gone to and returned from Moncton. There O'Donnell claims, in a portion of the Crown brief read into the record, that she and Nabout picked up Abdi and Adu from an unnamed hotel and brought them back to Miramichi to Schooner Point unbeknownst to the Al Saidi's.

[18] Apparently this was the turn of events that finally aroused the ire of the defendant's wife who became upset by the number of people who had joined their honeymoon vacation. A second cottage was rented for Adu and Abdi. It

was at that point the defendant says that a decision was taken for the men to leave for Miramichi to allow time for a cooling off period. That began the events that formed the subject matter of these charges.

[19] Several parts of the defendant's testimony are problematic. Firstly, he initially took the position that he had never met Adu before that night and had only seen Abdi twice before, once at a restaurant/gathering place in Mississauga called Aladdin and a second time at the defendant's apartment. He said that he could not recall why Abdi had come to his apartment. He was firm in reconfirming that alleged fact at the outset of cross-examination. The reasonable inference to be drawn from that evidence, if true, would be that because one bundle of counterfeit bills was found in Adu and Abdi's cabin and the other hidden behind Abdi's back in the Sebring it was unlikely that the defendant was knowingly in joint possession of the counterfeit bills with two men who were virtual strangers to him.

[20] Then he was the confronted on cross-examination with what he was alleged to have said in testimony at his bail hearing that he had met with Abdi and his girlfriend at his

apartment in Mississauga three or four times prior to the encounter in Miramichi. He resiled somewhat from his earlier statements to say that he was not sure if that was so. He was confronted a second time by Mr. Savoie that he had given that version of events in the previous testimony. He responded that maybe he did.

[21] Secondly, on direct examination he testified that he only knew about the counterfeit money carried by Nabout. He left the clear impression during that part of his testimony that he was admitting that he knew of the bills' true character, at least those in Mr. Nabout's possession. He continued on to say that he did not deny receiving and passing that particular counterfeit money. He added by way of explanation: "I received it from Nabout. Mr. Nabout…he not show up on my wedding night and he give it to me as a gift or something like that."

[22] Well into the cross-examination, however, he apparently sought to strengthen his position by saying firstly that a lot of the transactions attributed to him were paid for in Canadian funds. He added that none of what he bought with Canadian funds had been produced at the trial. He then went on to say that when counterfeit bills were tendered for

transactions in stores during the commission of the offences it would take place by Mr. Nabout jumping in front of him at the various cash registers and paying for the defendant's purchases with the $100 American counterfeit bills. He claimed that was the case with Ms. Hachey the cashier at the Walmart store. This minor but active involvement, he said, disallowed him from claiming he was not part of the transactions.

[23] He was confronted squarely on that issue by Mr. Savoie: "Did you say you never tendered any American currency?" He replied: "In my hand, I give it to the cashier? No." That exchange cannot be squared with his initial statements about having received counterfeit bills as a "gift or something like that" from Mr .Nabout.

[24] Nor can it be squared with the accepted evidence of Kim Curtis at Zeller's or Jacqueline Hachey at Walmart both of whom testified that the defendant made his own transactions with both of them without the involvement of any other person. While the video Clip #117 of C-14 at Walmart shows a second man, identified by Jeff McClenaghan as Mr. Nabout, in the vicinity of the defendant while the latter was transacting a purchase with Ms. Hachey there is no evidence

from either the witness Hachey or Clip #117 of C-14 that supports the proposition the defendant was being assisted by Nabout's dropping of $100 American bills on the counter each time a transaction took place.

[25] His attempt to diminish his involvement in the passing of counterfeit bills incurs further and insurmountable difficulty when stood beside the evidence that was given at trial by the Sobey's store employees regarding the transaction Brad Connell testified took place between the defendant and himself.

[26] The defendant admitted on cross-examination at the sentence hearing that he was the person who was at Brad Connell's cash at Sobey's store at approximately 7:00 p.m. on February 11th buying a chicken when Connell says an American $100 bill was offered for payment. Mr. Al Saidi testified that he paid for that item with Canadian funds.

[27] The evidence of Brad Connell was that he identified the defendant positively in the photo line-up and in the courtroom at trial as the person who bought the chicken that evening. He described him further as also having had an earpiece in his ear. As will be recalled, that eye

witness identification evidence was not accepted as positive identification of the defendant at trial. That finding resulted from possible police contamination of some of the eye witnesses at the store when three Sobey's employees were allowed to be present together in the same room when they made their statements immediately after the events on February 12th and reviewed the photo line-up individually. The officer admitted that each eye witness may have been able to hear selections made by the other. None of them were asked if this was so. (See paragraphs 132-136 Trial Judgment)

[28] Once the evidence of positive identification was rejected there was no necessity to continue on and make further findings of fact whether the evidence established that the transaction was sought to be completed with an American $100 bill. I am satisfied it was. That finding flows from the combined effect of the three witnesses with respect to the transaction at Brad Connell's cash.

[29] To recap the evidence on that point, Allison Forbes testified that she processed a transaction (at about 7:00 p.m. that evening) involving a man who came through her cash buying cookies and treats valued under $20 and

tendering an American $100 bill as payment. She required supervisor approval for the transaction and obtained it from Stacy Kingston who came to the cash to do so. At that moment, Forbes heard a page for Ms. Kingston to go to the smoke shop. That call, the evidence establishes, was for a cash register override for Gail MacDonald who had attempted to transact a sale with a man who had another $100 American bill. Forbes watched as Kingston, having concluded her business in the smoke shop in short order, left the smoke shop only to get paged to Brad Connell's cash to authorize the transaction that the defendant admits making with Connell for the chicken with a man now identified as Mr. Al Saidi. Forbes watched as Kingston refused to allow the transaction which Forbes said, as she watched from the very next cash, involved a $100 American bill. She was surprised that Kingston had vetoed that transaction as she had, just moments earlier, approved the same type of transaction at her till.

[30] All three, Connell, Kingston and Forbes say the transaction involved a $100 American bill. Connell identified the defendant as the man tendering the bill. He says he was wearing an odd earpiece in his ear at the time. The defendant admits he never took the earpiece out all

evening and that it was him at the cash with Connell. He says he was alone at the time he bought the chicken and that Nabout was not with him.

[31] I accept that the witnesses were correct in their independent recollections that the bill tendered for the purchases was an American $100 bill. Those recollections were reduced to writing on February 12th. There is no other reasonable conclusion that can be drawn from the whole of the evidence. The chicken was not bought by the defendant with Canadian funds.

[32] The Crown attempted to sully the reputation of the defendant by delving into some of his other business affairs. He was cross-examined about a $67,000 N.S.F. cheque he may have been involved with arising from a transaction by one of his companies, Canadian Global Business Ltd. He was asked if that occurred before he met Mr. Nabout. He refused to answer saying: “I will not discuss that!” He was again asked about the transaction and said: “I don’t like to discuss my business to make things complicated here.” When asked if he was refusing to answer he replied: “I don’t think it is helpful.” He was asked what the transaction involved. He replied: “Trade.” He was

asked what kind of business it involved. He answered: “With Kuwait.”

[33] At that point Mr. Hayes interjected and objected to the line of questioning. After being reminded by the Court that dispositional evidence not related to the matter being tried was only exceptionally admissible further questioning on that issue ceased. None of these allegations put to him and none of the defendant’s answers will be considered in assessing the credibility his testimony.

[34] The defence has argued that the testimony of the defendant ought to be accepted as credible evidence that he did not know of the other counterfeit bills. Mr. Hayes submits that support for this conclusion is found in the Crown summary of the evidence of Melissa O’Donnell that she and Mr. Nabout went to Moncton on February 11th and returned to Schooner Point with Adu and Abdi having picked them up at an unnamed Moncton hotel. This version of that part of the unfolding events is consistent with the defendant’s account. However, it does not explain the many inconsistencies that emerged from the defendant’s testimony some of which have been set out.

[35] In addition to those examples cited there is the overall improbability that four men would agree to carry out a blitzing one hour and ten minute sweep of the business area of Miramichi in which all of them were principals and not all be aware of what inventory of counterfeit bills that were available for distribution. It must not be forgotten that between the four of them $2100 in counterfeit bills were passed in some seventy minutes.

[36] The oft repeated principles of ***W.(D.)*** (*supra*) are relevant at this point. As Cory J. said at paragraph 28:

> **"Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:**
>
> **First, if you believe the evidence of the accused, obviously you must acquit.**
>
> **Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.**
>
> **Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a**

> **reasonable doubt by that evidence of the guilt of the accused."**

[37] See, also, *R. v. Leighton* (1994), 154 N.B.R. (2d) 211 (N.B.C.A.) at paragraphs 14-15.

[38] In addition to the discrete inconsistencies, some of which have been highlighted, what is very problematic is the overall improbability of the story advanced. In ***R. v. Khelawon*** [2005] O.J. No. 723 (O.C.A.) Rosenberg J.A. said in part at paragraph 104:

> **"…In Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357 in a classic statement describing the task of the trier of fact, O'Halloran J.A. said this:**
>
> **The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions."**

[39] For the reasons set out I cannot give any credence to the evidence of the defendant that he only knew of the bills given to him by Mr. Nabout. His evidence on that

issue is rejected. I accept the evidence given by the Sobey's employees as well as the evidence of Jacqueline Hachey and Kim Curtis that the defendant acted on his own passing counterfeit bills. That finding impacts the rest of his testimony. Having watched him testify, having considered the inconsistencies that appeared in his evidence and considering the overall high improbability of the story he advances his position that he did not know of and intend to jointly possess all of the counterfeit bills with the other defendants is rejected.

[40] As indicated, the sum of the accepted evidence in this matter in my view raises a *prima facie* case of joint constructive possession by the defendant and the other co-defendants. While that does not, as contended by the Crown, amount to a presumption it does expose the defendant to possible conviction on that evidence and allow the trier of fact to draw a reasonable inference that the defendant meets the criteria of possession set out in Section 4(3) of the *Criminal Code*. The weight of the evidence convinces me that the inference of joint constructive possession by all four defendants of all of the money is the only reasonable inference to be drawn in the circumstances.

The Defendants

[41] Very little in the way of background of the other defendants has been placed on the record at this sentence hearing. As for the defendant, Mr. Al Saidi, he is an immigrant from Palestine having come to Canada, according to Mr. Hayes, in 2002. The evidence discloses that he is recently married. He is thirty one years of age and has a Master's certificate in computer networking. He is registered in Canada with the Ontario Association of Certified Engineering Technicians and Technologists as an associate member and has had that status according a certificate tendered in evidence since 2002. His current citizenship status is that he has applied to become a "landed immigrant". A determination of that application is apparently still pending. No submissions have been made by the defense on the issue of whether his continued presence in Canada will be affected by his conviction and sentence in this matter. In some circumstances that is a legitimate issue for consideration by the trial judge. ***R. v. Kanthasamy*** (2005), 195 C.C.C. (3d) 182 (B.C.C.A.)

[42] According to his counsel, he has strong family support in Mississauga. If released on a community based sentence

he will be immediately employed in the family car business in that community.

[43] The defendant has worked as a volunteer in his home community of Mississauga helping those who have come to Canada from the Middle East with integration issues such as learning the English language. He has also apparently been socially active with new arrivals helping them become acquainted with the community in which they have chosen to live.

The Sentences of the Co-defendants

Mr. Nabout

[44] According to the defence, the principal offender is Mr. Nabout. He pleaded guilty to all three offences that were originally brought against the four defendants. At the time of his pleas of guilty he had been on remand for 97 days. He was accorded the equivalent of 194 days of pre-trial custody following an application of ***R. v. Wust*** (2000), 143 C.C.C. (3d) 129 (S.C.C.).

[45] Mr. Nabout and his counsel, Joel Pink Q.C., negotiated a joint submission on all of his charges in Miramichi of two years in federal penitentiary going forward from the date of his sentencing. He was at the time of sentence a first offender. Part of the sentencing in his case involved other similar charges in this judicial district that were separate from those for which he was jointly charged with the defendant and for which the Crown had originally sought a term of imprisonment of six months imprisonment. On the three charges of possessing and uttering counterfeit bills as well as the charge of possessing forged cheques, the Crown sought a global sentence of twelve months imprisonment on each of the three counts concurrent to each other going forward after remand of approximately six and one half months was credited. The total sentence *tentatively* sought in the joint submission, according to Mr. Savoie who was the prosecutor in that case, was eighteen months. However, the final recommended disposition changed for the unrelated three charges from six months consecutive to four months consecutive on each of the three unrelated counts consecutive to each other and consecutive to the charges Mr. Al Saidi also faced.

[46] After Mr. Nabout was ultimately sentenced in Miramichi to two years imprisonment he was taken to Halifax where, on unrelated but similar charges, he received a sentence of three years imprisonment concurrent.

[47] One might be forgiven for asking how a sentence of two years was initially imposed in Miramichi to start the sentencing process for Mr. Nabout when the Crown was merely seeking a sentence of eighteen months going forward. With his usual candor, Mr. Savoie informed the Court that the request for the two year sentence came from Mr. Pink. As is well known to those in the legal profession, as a first time federal offender (sentenced to two years or more of imprisonment) convicted of a nonviolent offence Mr. Nabout would very likely qualify for “accelerated release” if given a two years sentence of imprisonment instead of eighteen months imprisonment. In the latter case it is likely that the offender would serve two thirds or twelve months of the eighteen months sentence in prison.

[48] If sentenced to a two year federal sentence he would, on admission, have his paper file reviewed by a single member of the National Parole Board. If that National Parole Board member determined after reading the file that Mr. Nabout

was not more likely than not to re-offend in a violent way while on parole that board member would be obliged to order the release of Mr. Nabout once he had served one sixth of his global sentence.

[49] By having a federal sentence imposed as early as possible the parole time clock would begin to run and thus allow the Nova Scotia sentences to integrate with the New Brunswick sentences later. Under the *Corrections and Conditional Release Act*, S.C. 1992 Ch. 20, the global sentence of three years would likely see the release on parole of Mr. Nabout six months after the sentence in Miramichi had been imposed. This is of course of no concern to this Court as a matter of legal principle. See: ***R. v. C.A.M.*** [1996] 1 S.C.R. 500 (S.C.C.) per Lamer C.J. at paragraph 70; ***R. v. Zinck*** [2003] 1 S.C.R. 41 (S.C.C.) per Lebel J. at paragraph 18. See, also, ***"Judges and Parole Eligibility: Section 741.2"*** by Allan Manson (1995), 37 C.R. (4th) 381 at p. 394.

[50] What is relevant about the underpinning of Mr. Nabout's sentencing is the rationale behind the agreement between counsel to recommend a joint submission of two years imprisonment as a sentence for Mr. Nabout for his Miramichi

offences. That two year sentence was not, as has been explained, the true state of affairs as between the Crown and defence in Mr. Nabout's case. The true state of affairs was that the Crown was seeking a sentence of one year going forward for Mr. Nabout on the three charges Mr. Al Saidi shared with him, and a second sentence of six months imprisonment for the unrelated Miramichi offences. The facially rather bizarre positions adopted by the opposing parties which saw the Crown requesting an eighteen month sentence for the Miramichi offences while the defence sought a sentence of two years for those same offences are simply a product of the intricacies of the federal parole legislation, particularly ss. 125 and 126 of the *Corrections and Conditional Release Act* coupled with competent advocacy on the part of a very well respected criminal defence counsel, Mr. Pink.

[51] All of that goes to say that for the purposes of s. 718.2 (b) of the *Criminal Code of Canada* Mr. Nabout, but for intervention of the "accelerated parole" issue, would have been treated, and this defendant will be treated, as though the true joint submission of the parties in Mr. Nabout's case would have been a sentence of one year going forward for the three offences he was convicted of that

arose from the circumstances of this series of transactions with Mr. Al Saidi.

Mr. Adu

[52] On June 22, 2006 Mr. Adu pleaded guilty to the same two offences that Mr. Al Saidi has been convicted of in this trial. At the time of sentence he was a first offender. He had spent 132 days on remand. He was credited the equivalent of 264 days remand applying the ***Wust*** formula or approximately nine months of imprisonment. He was sentenced to a global sentence going forward of eight months additional imprisonment. Because he was not potentially affected by “accelerated release” he is likely to serve two thirds of this eight month sentence.

Mr. Abdi

[53] Mr. Adbi pleaded guilty on June 22, 2006 to one of the three counts for which he was originally jointly charge with the other three, namely, possession of counterfeit money. At the time of sentence he, like Mr. Adu, had served 132 days on remand and was credited 264 days. He was sentenced to four months going forward for that offence.

[54] Mr. Hayes has submitted on behalf of Mr. Al Saidi that the sentences imposed on Mr. Adu and Mr. Abdi ought not be considered when applying the provisions of s. 718.2(b) of the *Code* relating to sentence parity since, as a same sex couple, they were attempting to have the judge impose similar sentences in hopes that that they could be served together in the same institution. Whether that is true or not is arguably a matter of some speculation. Doubt creeps in to the weight to be accorded that submission when one considers that an obvious symmetry exists between the quantum of individual sentences imposed on Mr. Nabout, Mr. Adu and Mr. Abdi for their respective involvements in these offences. It has not been suggested by Mr. Hayes that Mr. Nabout was part of that particular relationship.

[55] The Crown submits that the defendant has lost the benefit of a significant mitigating circumstance gained by the other defendants through their guilty pleas. He posits that such an admission affords the best evidence that the other defendants were ready to take responsibility for their actions and be held to account.

[56] In the final analysis the Crown has submitted that a global sentence of eight months going forward on the two

principal possession and uttering of counterfeit charges is just and that a sentence of one month consecutive be imposed for breach of the undertaking to a peace officer or officer in charge. Of course the absence of a guilty plea in this case is not a negative factor but merely an absence of a positive factor that favoured the other accused.

[57] Mr. Hayes, as noted, submits that the appropriate sentence is one of time served coupled with a community based disposition. He points to the unblemished record of the defendant as well as his involvement in the community, his educational background and his strong family support to buttress his submission.

Analysis

[58] I find that the four accused acted more or less in concert during this particular enterprise; less only because little has been said about Mr. Abdi’s involvement in these offences. The compressed time frame of just over an hour during which all twenty one of the bills were passed, their local shared residence, however temporary, together with their being arrested in the same vehicle supports that conclusion. None of the defendants are from

the local area. The evidence confirms that they are residents of the province of Ontario.

[59] It may be that the naturally trusting nature of the Maritime area of Canada formed part of the reason that they chose Miramichi in order to carry out this crime. One will never know. However, the ease with which the saleswomen in the various stores accepted the bills provides some evidence of the reasonableness of that inference.

[60] There is a parasitic aspect to the offence of passing counterfeit money in that the perpetrators of this type of offence in a calculating way prey on the trusting nature of innocent people, in this case a series of cashiers who find themselves economically at the very base of the retail merchandising paradigm. The offence is calculating and premeditated in its nature since it sometimes involves considerable marketing in order to dupe those who are the intended victims.

[61] In some circumstances, as was evident from the circumstances surrounding some of the transactions in this case, the drawing in of the victim is done with a degree of sophistication. To be fair, the defendant did not engage in

this kind of slick marketing of the counterfeit bills as other co-accused did. It would appear clear from all of the evidence that that sort of approach is not his nature. But others who, it has been established, were with him did engage in that type of behaviour. The only significance of that observation is to eliminate any possible conclusion that these men were nervous or guilt ridden about what it was they were doing at the time the offences were committed.

[62] It may be illuminating with respect to his experience and his relatively unsophisticated criminal behaviour that Mr. Al Saidi would travel about a small community such as Miramichi, a place with only a miniscule immigrant population, wearing an unusual and relatively large appliance affixed to his ear that surely would make identification of him an easier matter for eye witnesses at a later time should his crimes be uncovered as they were.

[63] As noted, the crimes the defendant has committed are not ones of impulse or those evincing a momentary lapse in judgment. Given the number of bills possessed by the men, they were clearly involved as a vital part of a sophisticated criminal enterprise, one that required

someone to manufacture the bills to begin the process, bills it should be noted that were of very high quality, and then distribute them to the accused who came to New Brunswick in the midst of winter and passed them.

[64] In this case, the offender is a principal player. He did not simply accompany others and stay in the background. He participated actively in duping unsuspecting cashiers in stores into taking the worthless bills. There was a commercial character to the operation that is clear and convincing. It is evident from the speed with which the men passed over two thousand dollars worth of counterfeit bills in approximately 1 hour and 10 minutes. In addition, there was a very high quality to the bills. The blitzing manner in which the operation was carried out makes any argument of momentary lapse of judgment difficult to consider as a relevant factor in sentence. The total value of the bills either possessed or transacted by the men was high at $12,200. Plainly and simply put, this was a criminal enterprise for profit operation.

[65] The offence of counterfeiting is one of the fastest growing offences in this country. Evidence received at the sentence hearing shows that the incidence of this crime has

increased dramatically in the last several years. In 1992 some 21,200 counterfeit bills were passed in Canada. By 2005 403,000 notes were passed, an increase of 1800%. In addition, the dollar value of counterfeit passed increased from $575,000 in 1992 to $9,400,000 in 2005. The most concerning increase occurred between 2002 and 2004 when the percentage increase was 100%.

[66] The Bank of Canada, according to the evidence filed, attributes the increase to the availability of high quality computer printing equipment. That is an entirely reasonable conclusion. Additional incidental costs have also risen for the Bank of Canada in its attempt to combat the increased prevalence of this crime. It has, as is well known to all Canadians and noted in the evidence filed, recently recast the design of Canadian paper currency to attempt to make the manufacture of counterfeit Canadian bills more difficult. The cost of the new Canadian Journey notes design was $20,000,000. In addition, the cost of manufacturing the new notes has gone from 6.5 cents per note to 9 cents.

[67] Finally, to complete the national context with respect to this crime, it must be acknowledged that while the

proliferation of fake bank notes in circulation rose dramatically from 1992 until 2004 when it reached its height, it did fall back slightly in 2005. Clearly the prevalence of this offence remains a major concern for all.

[68] The crime of counterfeiting crosses a rather wide sentence spectrum. That principally owes to the maximum penalty for both of the counterfeiting offences involved here of fourteen years imprisonment. Broadly speaking, these offences fall into three general categories from most serious to leas serious. High sentences are reserved for those found to have manufactured bills or possessed the equipment to manufacture. Not far removed are high and moderately high sentences for those who possess or transact large quantities of counterfeit bills. At the low end of the scale are those offenders who possess or transact only a few bills and cannot be considered to be engaging in a commercial criminal enterprise.

[69] Overall, sentencing of all of these offenders has focussed on general deterrence of offenders. In my view, a clear message must be sent to those who might be inclined to enter this financially lucrative world. To a lesser extent a message must also be sent to this offender that

the temptation of indulging in this again carries great risk. The sentence must take into account the important principles of denunciation and deterrence. In ***R. v. Le*** [1993] B.C.J. No. 165 (B.C.C.A.) MacEachern C.J. noted the importance of deterrence as a factor in sentencing counterfeiters. At paragraph 6 he said:

> **"Counterfeiting is an offence for which, in my view, deterrence is a far more important factor than it is for many other offences. It requires pre-meditation and planning and is driven entirely by greed."**

[70] In ***R. v. Dunn*** [1998] O.J. No. 807 (O.C.A.) the Court noted at paragraph 7 in part:

> **"…Nonetheless, we are mindful of the fact that forgery is a serious offence involving, in its more sophisticated applications, a threat to national economic stability and other serious concerns where foreign currency is involved."**

[71] A summary of many of the relevant counterfeiting cases was provided by Judge Allen in ***R. v. Christophersen*** [2002] A.J. No. 1330 (A. P. Ct.). At paragraphs 25-34 they are set out and bear repeating:

“In R. v. Sonsalla (1971), 15 C.R.N.S. 99 (Que. C.A.), the accused was convicted of possession of counterfeit money and possession of instruments for counterfeiting. He had in his possession 24,100 counterfeit $20 bills, film and other items used by printers to produce such bills. He was sentenced by the trial judge to 1 year. The Court of Appeal noted that the Crown Attorney alleged that counterfeiting caused economic problems for all society and that persons charged with these offences should be dealt with severely. Moreover, the Crown's position was that a more severe sentence was required for printers as opposed to distributors. The Court indicated that sentences for such offences should be punitive and exemplary. General deterrence was also significant. The Court of Appeal allowed the Crown appeal and sentenced the accused to 4 years imprisonment.

In R. v. Leung [1985] B.C.J. No. 2165 (BCCA), three accused with no criminal records plead guilty to various offences relating to the possession of counterfeit traveller's cheques, possessing counterfeit money, uttering forged traveller's cheques, and using a forged document. The Trial Judge sentenced one accused to 14 years in custody; the other two received 8 year sentences. One accused was found in possession of $65,000 U.S. counterfeit traveller's cheques, and $1,600 of U.S. counterfeit money. The second accused had cashed $5,500 of counterfeit cheques at 11 banks. The third accused was in possession of unspecified amount of counterfeit cash. The Court of Appeal reduced the sentences of the first and third accused to 2 years. The second accused received 2 years on some

offences and 3 months consecutive on the other. Apparently, $500,000 of counterfeit traveller's cheques stemming from the same source had been circulated. The Court observed that the three were not particularly sophisticated but were prepared for their own ends to participate in an extensive operation.

In R. v. Bruno [1991] O.J. No. 2680 (Ont. Gen Div.), the accused possessed more than one million dollars of counterfeit U.S. bills. The accused was sentenced to 30 months imprisonment. This created a major danger to the country by flooding the country with these bills. Deterrence was found to a major factor in all counterfeiting cases but especially in a case of that enormity.

In R. v. Le [1993] B.C.J. No. 165 (BCCA) the accused was convicted of uttering $100 counterfeit bills. On arrest he had 24 such bills and may have had $8,000 of these bills in his possession. He was an unsophisticated offender without criminal antecedents or gang connections. The accused was sentenced to 9 months imprisonment; the Court of Appeal dismissed his sentence appeal. MacEachern C.J.C.A. observed that "Counterfeiting is an offence for which, in my view, deterrence is a far more important factor than it is for many other offences. It requires premeditation and planning and is driven entirely by greed."

In R. v. Rachid [1994] O.J. No. 4228 (Ont. Prov. Ct.), the accused was convicted of offences of possession of and uttering counterfeit U.S. $20 bills. Eighteen such bills were on the

accused. The sentencing judge sentenced him to 5 months imprisonment and 12 months probation. In the circumstances evidence was led as to the prevalence of the crime in the community and this was properly considered to increase the gravity of the crime. The position of the sentencing judge was that possession of foreign counterfeit money was an aggravating factor. Possession of counterfeit money is a serious offence and one which usually warrants incarceration, absent very unusual circumstances.

In R. v. Germain [1995] A.Q. No. 254 the accused circulated counterfeit money and received a $3,000 fine.

In R. v. Dunn [1998] O.J. No. 807 (Ont. C.A.) the accused was convicted of making counterfeit money, conspiring to make counterfeit money, and having in his possession a machine intended for use in making counterfeit money. The accused was part of a group who had leased a photocopier and used it to make counterfeit U.S. money. The accused was 22 years of age, and had the substantial confidence of his family. He had married since the commission of the offence. He had served 19 days of his sentence and this had a lasting effect on him. The Court of Appeal reaffirmed that counterfeiting was a serious offence which in sophisticated applications was a threat to national economic security and other concerns where foreign currency was involved. However, these circumstances involved a small amount of money and the bills produced were of amateur quality. The Court held that individual deterrence was not a factor. The Court of Appeal acknowledged that general deterrence is very important in

these cases but felt that leniency would not lead others to consider taking such offences lightly. The Court of Appeal substituted a conditional sentence of 2 years less one day for the 30-month sentence imposed by the trial judge.

In R. v. Desrochers [1998] A.Q. No. 934 (Quebec Court Crim. Div.) the accused was sentenced to 3 years penitentiary. The accused admitted to fabricating and possessing counterfeit money. Police found a photocopier and $998,080 of Canadian bills printed on one side. He had a cocaine problem and a criminal record.

In R. v. Mankoo [2000] O.J. 1869 (Ont. C.A.) the accused was a courier of counterfeit money and had counterfeit money that exceeded $300,000, plates capable of producing additional counterfeit currency and international passports. He had a prior criminal record and was on probation at the time of the offence. The Court of Appeal dismissed his appeal from a sentence of twenty three and one half months.

In R. v. Haldane [2001] O.J. 5161 (Ont. Sup. Ct.) The accused was found guilty by a jury of making counterfeit money and possession of forgery tools. He was a 48 year old man with a record of minor property offences. He had 17 bills. The sentencing judge found that the making of the bills was relatively unsophisticated. A significant, deterrent penalty was needed. The accused was sentenced to 30 months."

[72] To that can be added the case of ***R. v. Rafuse*** (2005), 193 C.C.C. (3d) 234 (S.C.A.) The accused, a man with over twenty convictions, mostly theft related, was found in possession of five Canadian $100 bills in a vehicle and misidentified himself on arrest. He had spent 106 days on remand before pleading guilty.

[73] At trial he was sentenced to twelve months on the counterfeiting charge and six months consecutive on the associated personation charge. In allowing the appeal on the counterfeiting charge and reducing the sentence to six months consecutive to the six months on the personation charge the Court of Appeal noted that counterfeiting is the fastest growing crime in Canada acknowledging that it had become the sixth most common crime in Canada by 2003 growing 72% from the previous year. The Court found at paragraph 12-13:

> **"An examination of the jurisprudence regarding sentences for similar offences in similar circumstances reveals that the range is from six months to two years less a day. There have been cases which exceed two years less a day but they are rare. The sentences imposed are adjusted upward to the high end depending on the amount of counterfeit money involved and in cases involving large amounts of**

> **counterfeit money and a sophisticated operation may exceed two years.**
>
> **The offence for the offender in this case was at the lower end of the scale, particularly having regard to the fact that there is nothing to connect the appellant to the production of the counterfeit and that he was in possession of a relatively small amount of the counterfeit money."**

[74] It must be borne in mind that many of the precedents noted herein predate the dramatic increase in the prevalence of this crime that have occurred during the past few years. Accordingly their precedential value must be weighted with that increase in mind.

Conclusion

[75] The principal purpose of sentencing, of course, is to protect the public by denouncing unlawful conduct, deterring offenders and other persons who might be so inclined, separating offenders where necessary from society, and assisting in rehabilitation of the offender through the promotion of a sense of responsibility in the offender.

[76] Sentences must be proportional to the gravity of the offence given the degree of responsibility of the offender, and must be similar to sentences imposed on similar offenders who have committed similar offences in similar circumstances. In this case the defendant is a principal party having both possessed and passed several counterfeit bills himself and by being part of a physically tightly knit group on the night the offences were committed.

[77] The defendant committed these offences while in the company of the three others with whom he was associated. The sentences imposed upon them are an important consideration in deciding what the appropriate penalty ought to be in these cases.

[78] To summarize, Mr. Nabout, after pleading guilty, received a sentence of one year imprisonment going forward, imposed by Strange P.C.J., for convictions on all three counts originally charged after serving 97 days on remand. Doubling that time to arrive at a proper remand credit of 192 days (approximately 6.5 months) results in a total sentence of 17.5 months imprisonment “equivalent” for these three offences. It should be noted that the totality principle was in play in his proceedings as there were

unrelated matters that he was sentenced for at the same time.

[79] The defendant Mr. Adu pleaded guilty to the same two offences that Mr. Al Saidi was been convicted of, namely, possession and uttering counterfeit. He had spent 132 days on remand and was given credit for 264 days custody (approximately 9 months) before the sentence of 8 months imprisonment going forward was imposed by Lordon P.C.J. The total “equivalent” sentence in his case was 17 months imprisonment equivalent.

[80] The defendant Mr. Abdi pleaded guilty to one count possession of counterfeit. He had spent 132 days on remand and was given the equivalent credit of 264 days custody (approximately 9 months). He received a sentence of 4 months going forward. The total “equivalent” sentence in his case was one of 13 months imprisonment. None of the co-defendants had any criminal record to speak of.

[81] Mr. Al Saidi has served 188 days on remand. He will be given equivalent credit for 376 days of pre-trial custody (approximately 12.5 months). He, of course, does not benefit from the mitigating circumstance of having pleaded

guilty as the others have. That is an important principle of sentence mitigation as it affords the best evidence that a person is ready to be held to account and take responsibility for the offences they have committed.

[82] Mr. Hayes has contended that the sentences of the others should not be given serious consideration in determining the appropriate sentence for his client for the various reasons already set out. It must be noted, however, that all of the other defendants were represented by very experienced and able criminal defence counsel; Mr. Nabout by Joel Pink Q.C., Mr. Adu by Graham Sleeth Q.C. and Mr. Abdi by Gilles Lemieux. That fact must be considered in conjunction with the previously noted symmetry in the sentences imposed on each of the other defendants relative to the respective involvements in these offences by two different very experienced and respected judges.

[83] Taken together, all of those factors convince me that the sentences imposed on the co-defendants are highly probative of what the appropriate sentence ought to be in this instance. These offences were committed by the defendants together. That, too, enhances the importance of the sentence meted out to the others.

[84] As well, the importance of the principle of general deterrence in the sentencing of anyone convicted of this type of offence considered against the background of rapidly increasing incidence of this crime over the last several years convinces me that a sentence of “time served” together with a community based sentence does not provide adequate denunciation of this offence.

[85] The recommended sentence by Mr. Savoie of nine months going forward is, in my view reasonable. That recommended sentence is generous to the defendant in allocating very little mitigation of sentence for those that pleaded guilty. In my view the appropriate sentence for each of the two counts contrary to ss. 450(b) and 452(a) of the *Criminal Code* on which convictions were entered is a sentence of eight months imprisonment going forward. The sentences will run concurrently. With respect to the offence contrary to s. 145(5.1)(a) of the *Criminal Code* a sentence of one month consecutive going forward is imposed.

[86] In addition, the parties have agreed that a portion of the money seized from the defendant at the time of his arrest ought to be used to pay his prorated share of the restitution required to put the victims of this crime back

in the position they were in before the offences. Those amounts are set out in Exhibit C-19. Those amounts are: Zeller’s $274.58, Shopper’s Drug Mart 37.00, Agnew Bentley’s 36.65, Bulk Barn 73.34, Payless Shoes 36.66, Cotton Ginny 38.34, Walmart 144.00, Irving Route 11 Convenience 38.00, Sobey’s 33.67, Mark’s Workwearhouse 39.24. A restitution order to that effect pursuant to s. 738 of the *Criminal Code* and enforced by immediately applying a portion of the money seized at the time of arrest from the defendant as warranted pursuant to s. 741 (2) of the *Criminal Code* is hereby ordered.

Fred Ferguson Prov. Ct. J.